POH CHEE SENG

v.

MAJLIS PEGUAM

HIGH COURT MALAYA, IPOH
LEE SWEE SENG JC
[ORIGINATING MOTION NO: 25-4-01-2012]
31 MAY 2013

LEGAL PROFESSION: *Misconduct - Acting in a manner unbefitting of an advocate and solicitor - Breach of undertaking - Stakeholder - Sale and purchase agreement - Solicitor returned bank draft to client for balance purchase price which should have been placed in fixed deposit account - Legal Profession Act 1976, s. 94(3)(o)*

LEGAL PROFESSION: *Professional discipline - Misconduct - Breach of undertaking - Stakeholder - Sale and purchase agreement - Solicitor returned bank draft to client for balance purchase price which should have been placed in fixed deposit account - Whether conduct unbefitting of an advocate and solicitor - Whether solicitor committed professional misconduct - Legal Profession Act 1976, s. 94(3)(o)*

LEGAL PROFESSION: *Professional discipline - Misconduct - Breach of undertaking - Stakeholder - Sale and purchase agreement - Withdrawal of complaint by complainant - Whether respondent as Malaysian Bar can pursue complaint further*

The applicant/appellant ('the applicant') an advocate and solicitor, was found to have committed professional misconduct under s. 94(3)(o) of the Legal Profession Act 1976 ('LPA') and was fined RM5,000. Dissatisfied, the applicant filed this application to set aside the said decision. The finding was made by the disciplinary committee ('DC') under the LPA which ruled that the applicant breached his undertaking and stakeholder duty under a sale and purchase agreement ('SPA') of shares in a company which owned a piece of land ('the land'). The applicant had acted for the purchasers of the shares. The purchase price of the shares was RM1.5m out of which RM300,000 was to be paid to the vendors ('Siew' and his daughter) upon execution of the SPA and the balance RM1.2m together with accrued interest thereon was to be released to the vendors within a month of the removal of a caveat on the land. It was expressly provided under the SPA

('cl. 2.1(b)') that the RM1.2m was to be placed in a fixed deposit ('FD') account by the applicant's firm as stakeholders. When the SPA was signed at that time by Siew alone, the purchasers deposited with applicant's firm not only the RM300,000 but also the balance of RM1.2m by way of bank draft. However, because Siew's daughter had yet to sign the SPA and because the relevant documents to complete the transaction had yet to be deposited with the vendor's solicitors, the applicant's client requested for the RM1.2m bank draft to be returned to him as he needed funds. The applicant complied with the request. When the vendor's solicitors returned the SPA for stamping, after execution by Siew's daughter, two weeks later and they requested for a copy of the receipt showing the RM1.2m had been placed on FD, the applicant then disclosed that he had returned the bank draft to his client. The draft was only re-deposited with the applicant's firm more than a month after the SPA was signed. Siew lodged a complaint with the Disciplinary Board ('DB') under the LPA against the applicant over his failure to pay him the RM6,500 interest he would have earned if the applicant had placed the RM1.2m on FD as soon as he had first received that sum. The complaint was withdrawn when the applicant's client settled the interest sum claimed by Siew. The respondent, on its own motion, filed a complaint against the applicant for misconduct.

Held (dismissing the application with no order as to costs):

(1) In releasing the RM1.2m to his client without complying with cl. 2.1(b) of the SPA, the applicant had committed misconduct within the scope of s. 94(3)(o) of the LPA. There was no good reason to disturb the finding of misconduct as well as the penalty that was imposed. (paras 49 & 52)

(2) When the applicant forwarded his firm's letter of 5 November 1996 to the vendor's solicitors (confirming the RM1.2m had been deposited with his firm), he either knew or should have known that the vendors and their solicitors would rely and/or act on the letter. The court agreed with the DC's finding that when the applicant returned the RM1.2m after he had given the said letter, he breached his representation and/or undertaking in his letter for he knew or ought to have known that Siew and his solicitors would consider this to be a breach of his representation and/or undertaking in his said letter. (para 36)

(3) Given his dilemma, the applicant should have taken out an interpleader's summons under O. 17 r. 1 of the Rules of the High Court 1980 for the court to determine what he should have done in the circumstances. Without calling in aid the assistance of the court in such manner, a solicitor took the risk of being sued or of a complaint being lodged against him for what appeared to be a breach of solicitor's undertaking and breach of the terms of stakeholding. (paras 40 & 42)

(4) The withdrawal of the complaint by Siew did not mean that if there had been any compromise with the high standards expected and exacted of a member of the Bar, the respondent being the executive body of the Malaysian Bar was to turn a blind eye and consider the chapter closed. It was incumbent on the respondent to pursue further the complaint against the advocate and solicitor concerned so that no member of the public was similarly troubled in future. More particularly, the advocate and solicitor concerned should know assuredly that any breach of his undertaking or of his duty as stakeholder is a misconduct that attracts punishment. (para 28)

Case(s) referred to:

Bolton v. Law Society [1994] 2 APP ER 486 ***(refd)***

Dato' Kanagalingam Velupillai v. Majlis Peguam & Anor [2004] 5 CLJ 505 HC ***(refd)***

Gana Muthusamy v. Tetuan LM Ong & Co [1998] 4 CLJ 878 CA ***(foll)***

How v. Tricorp Properties Sdn Bhd; Majlis Peguam Malaysia (Intervener) [2011] 4 CLJ 909 HC ***(refd)***

Keith Sellar v. Lee Kwang and Tennakoon V Lee Kwang [1980] 1 LNS 36 FC ***(refd)***

Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor [1982] 1 LNS 73 HC ***(refd)***

Law Society of Singapore v. Tham Kok Leong Thomas [2006] 1 SLR 775 ***(refd)***

Tan Kau Tiah v. Tetuan Teh Kim Teh, Salina & Co & Anor [2010] 4 CLJ 914 CA ***(refd)***

Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 SC ***(refd)***

Legislation referred to:

Legal Profession Act 1976, ss. 42(1)(b), 93(3), 94(3)(k), (o), (4)(b), (5), 99(1), 103E

Legal Profession (Disciplinary Board) (Procedure) Rules 1994, r. 4(1)

Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, rr. 7, 8

Rules of the High Court 1980, O. 17 r. 1

Other source(s) referred to:
Jeffrey Pinsler, *Ethics And Professional Responsibility - A Code for the Advocate And Solicitor*, 2007, pp 388-389

For the applicant/appellant - EP Seeralasittan; M/s Chong & Poh
For the respondent - Babu Raj Raja Gopal; M/s Kean Chye & Sivalingam

Reported by Ashok Kumar

JUDGMENT

Lee Swee Seng JC:

[1] Our word is our bond! In no profession is this more expected of and exacted from than members of the honourable legal profession. Truth and trustworthiness are hallmarks of the profession. No profession wrestles with the issues of truth and trust more than the legal profession. With them would resonate the repeated refrain "... to tell the truth, the whole truth and nothing but the truth." On them are reposed the trust of clients and third parties where their monies, assets, wealth and rights are concerned.

[2] This complaint against a lawyer tells the story of how when the defining moment came, at the demand of a client, the lawyer condescended and then later contended that his action was nevertheless justified given the circumstances of the case.

Parties And Personalities

[3] The initial complainant was one Mr Siew ("Siew"). He made a complaint to the Advocates and Solicitors Disciplinary Board (DB) set up under the Legal Profession Act 1976. His complaint was against the legal firm of Messrs Chong & Poh. It had to do with the interest of about RM6,500 that was not paid to him under a sale of shares agreement where he and his daughter were vendors. When the agreement was signed, the applicant/appellant Mr Poh Chee Seng ("Poh") had given a letter dated 5 November 1996 to Siew's solicitors Messrs Fong dan Rakan-Rakan that a bank draft for RM1.2 million had been deposited with his firm Messrs Chong & Poh as stakeholders, being the balance purchase price of the entire shares in a company called Kuari Kinta Sdn

Bhd. The said confirmation was pursuant to the terms of the agreement where upon the execution of the agreement the said sum of RM1.2 million had to be so deposited. Messrs Chong & Poh were representing the purchasers one Mr Law and one Encik Kamaruddin.

[4] The complaint was subsequently withdrawn as after the complaint was lodged, the applicant's client Law had paid to the complainant Siew the interest of RM6,500 that should have been earned on the stakeholder's sum of RM1.2 million. Even though the complaint had been withdrawn, the Bar Council exercising its powers under r. 8 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, had intervened and proceeded with the complaint as if it was made of its own motion. The Bar Council framed the complaint against the applicant, Poh and his partner Mr Chong Sin Kwong ("Chong") for misconduct under s. 94(3)(k) and/or 94(3)(o) of the Legal Profession Act 1976 (LPA).

Problem

[5] The said sum together with accrued interest was to be released to the vendors within a month from the removal of a caveat from a piece of land owned by the company. Indeed with the completion of the purchase of the shares, and the payment of the full purchase price for the shares, the purchasers would end up being the shareholders of the company that own the land. The initial deposit of RM300,000 in a cheque was handed over by the applicant to Messrs Fong dan Rakan-Rakan upon the execution of the agreement.

[6] The purchasers wanted to treat the agreement as valid and binding upon the execution by Siew even though his daughter had not signed yet. Little wonder that both the initial deposit of RM300,000 and the balance purchase price of RM1.2 million were paid upon the execution by Siew alone on 5 November 1996. Under the agreement the said sum of RM1.2 million was to be placed in an interest-earning account by Messrs Chong & Poh as stakeholder solicitors and that the interests earned shall be paid over the vendors upon completion of the sale of shares.

[7] There are hazards in every profession and the legal profession is no different. Here the temptation came from the client of Messrs Chong & Poh, in the person of Law. He asked if

A the agreement had been signed by Siew's daughter and when the applicant told him "not yet", he asked if the bank draft could be returned to him for he needed the monies for his other business dealings. The same Law had earlier instructed the applicant not to bank in the bank draft into the firm's account!

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[8] The applicant said he was faced with a Hobson's choice. Law was a long-standing client. Not to accede to his request would incur his wrath or at least his displeasure or perhaps, so he thought, be sued by his client. At the very least there would C be no new legal work coming from him. To accede to his request might expose him to a disciplinary action for breach of a solicitor's undertaking or a stakeholder's' duty if the other side should complain. He reasoned that as the agreement had not been signed yet by Siew's daughter and the relevant documents had not been D deposited with Siew's solicitors under the agreement, there was no need to retain the bank draft and so he returned it to his client.

[9] He did not see it fit to inform Messrs Fong dan Rakan-Rakan about the release of the bank draft that he had earlier represented in writing that it had been so deposited with his firm E pursuant to the agreement. He certainly did not obtain Messrs Fong dan Rakan-Rakan's consent. Sure enough Messrs Fong dan Rakan-Rakan, when returning the agreement duly signed by Siew's daughter, asked for confirmation that cl. 2.1(b) of the agreement had been complied with in that the sum of RM1.2 million is F already placed in fixed deposit in the clients' account of Messrs Chong & Poh. Their letter was dated 19 November 1996. They asked for a copy of the fixed deposit receipt.

[10] The truth could no longer be contained. Messrs Chong & G Poh had to disclose the truth which was that the bank draft had been returned to their client Law. It was only re-deposited with them on 26 December 1996.

[11] The Disciplinary Committee, after reading the representations H of the parties and the facts as found by the Investigating Tribunal, not being in dispute, found the applicant guilty of misconduct under s. 94(3)(o) of the LPA. No misconduct was found against the applicant's partner Chong as he was not the partner in charged of the transaction.

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[12] The applicant was fined RM5,000 by the DB.

Prayer

[13] The applicant/appellant here being dissatisfied with the decision of the DB had filed this originating motion dated 16 January 2012 to set aside the decision of the DB dated 9 December 2011 under s. 103E of the LPA. The grounds are as follows:

(i) Breach of natural justice;

(ii) That the Bar Council had pursued the wrong complaint against the applicant as the complaint by the initial complainant was for non-payment of interest; and

(iii) That there was no breach of undertaking or stakeholder's duty by the applicant in the circumstances of the case.

Principle

Whether There Was A Breach Of Natural Justice

[14] The breach of natural justice point was clarified in the written submission of the applicant to be this: that the President of the Bar Council is the complainant and also a member of the DB. As such there is a breach of natural justice. Under s. 93(3) of the LPA, the composition of the DB shall consist of, among others, the following:

(a) ...

(b) the President of the Bar Council with the Vice-President as his alternate.

[15] Rule 4(1) of the Legal Profession (Disciplinary Board) (Procedure) Rules 1994 states:

> Where the Bar Council is the complainant or where the Bar Council intervenes under rule 8 of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, the President of the Bar Council or his alternate, as the case may be, shall be disqualified as member of the Disciplinary Board for the purpose of the quorum.

[16] Learned counsel for the applicant cited the case of *Dato' Kanagalingam Velupillai v. Majlis Peguam & Anor* [2004] 5 CLJ 505; [2004] 2 MLJ 504 where at pp. 512-512 (CLJ); p. 510 (MLJ) it was held as follows:

> [21] In this case, it is common ground that the Bar Council was the complainant. As such, the President of the Bar Council or his alternate would be a disqualified person to be a member of the Disciplinary Board. Such being the situation, it would be very essential to ensure that the President of the Bar Council or his alternate was not a member of the Disciplinary Board when it made the decision to constitute the Investigating Tribunal to investigate the complaints against the appellant. Towards this end, the appellant had written to Disciplinary Board (second respondent) requesting for the names of the members who attended the Disciplinary Board Meeting which deliberated the Bar Council complaint. But in its reply the second respondent refused to accede to the appellant's request. In our view, in order to ensure that unqualified persons do not attend the meetings, it was almost essential for the second respondent to respond positively to the appellant's request and reveal the names of the members attending the said meeting. Because the second respondent refused to reveal the names of the members who attended the said meeting, s. 114(g) of the Evidence Act 1950 can be invoked, thereby raising the presumption that the President of the Bar Council or his alternate was present at the said meeting. It is essential whenever the second respondent make any decision or order the rules of natural justice must be adhered to and elements of biasness be removed. We need only to refer to the case of *Rohana bte Ariffin & Anor v. Universiti Sains Malaysia* [1989] 1 MLJ 487 where Edgar Joseph Jr J (as he then was) held (at p 489):
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> > ... the proceedings before the disciplinary authority were contrary to natural justice owing to the presence of the registrar of the respondent university, the complaint of both applicants during the disciplinary authority's deliberation.

[17] The facts here are poles apart. There is no evidence that the President of the Bar Council or his alternate was a member of the DB that had made the decision to constitute the Investigating Tribunal or the subsequent Disciplinary Committee to hear the complaint.

[18] This is a not case where the applicant had taken issue with the Bar Council on the inclusion of the President of the Bar Council or his alternate in the decision making process that led to a finding of misconduct and a fine of RM5,000 against the

applicant. Learned counsel for the applicant when questioned by the court that there is no iota of evidence to support this allegation taken up at submission stage, promptly withdrew this line of argument.

[19] Yet another angle as to why the applicant had contended that there was a breach of natural justice was the allegation that the applicant had been denied a right of hearing by the Advocates and Solicitors Disciplinary Board. This contention is misconceived. The minutes of the Disciplinary Committee hearing on 6 September 2011 at 3pm at Wisma Maran is clear. At p. 18 of the affidavit of Tony Woon (encl. 3), the Honorary Secretary of the Bar Council, it was minuted as follows:

> 1. Both parties inform the Disciplinary Committee that they have agreed not to call witnesses but they will rely on the documents in the Record of Complaint to prove their respective complaint and explanation and they wish to give written submissions for the same.
>
> 2. Both parties also agreed to dispense with the makers and originals of the documents in the Record of Complaint.

[20] That being the case, the allegation of breach of natural justice does not hold water. Indeed reading the record of complaint one would readily agree that there are no disputes on the material facts before the Investigating Tribunal and the Disciplinary Committee. What the Disciplinary Committee needed to decide before it was whether the facts as they stood and not challenged by the applicant amounted to a breach of undertaking and stakeholder's duty by the applicant in the circumstance of the case.

Whether The Bar Council Had Pursued The Wrong Complaint Against The Applicant As The Complaint By The Initial Complainant Was For Non-payment Of Interest

[21] The initial complainant Siew had only withdrawn his complaint against the legal firm of Messrs Chong & Poh on 19 November 2002. See p. 210 of the affidavit of the applicant (encl. 5). The finding of facts of the Investigating Tribunal dated 6 November 2001 was that Siew's claim for interest for the period 6 November 1996 to 1 January 1997 was settled by Law by the payment of RM6,500 in an agreement dated 18 September 1997.

A See p. 195 of encl. 5. There is no doubt that the complaint about the conduct of the applicant is that of breach of undertaking and stakeholder's duty and that what the complainant suffered was the loss of interest arising out of the non-placement of the RM1.2 million into a fixed deposit interest earning account by the B applicant. The relevant paragraphs of the complaint of the initial complainant dated 30 January 1997 at pp. 1-2 of encl. 5 are reproduced below:

> 6. I signed the agreement on the same date (5 November 1996) in front of all parties present at the meeting, so did C Mr Law.
>
> 7. Upon execution, Mr Poh handed over a cheque of RM30,000 to my Solicitors Mr Fong with a covering letter for Mr Fong to acknowledge.
>
> D
> 8. In the covering letter, M/s Chong & Poh confirmed that the sum of RM1,200,000.00 had been handled *(sic)* to them as **stakeholder pursuant to the terms of the Sale and Purchase Agreement.**
>
> E 9. One of the terms of the agreement states that the Purchaser Solicitors are **to release the RM1,200,000.00 together with any accrued interest to the Vendors Solicitors** within one (1) month from the date of removal of the caveat. ...
>
> 13. **By the conduct of M/s Chong & Poh, I have suffered** F **damages in terms of interest loss** on the RM1,200,000.00, and that M/s Chong & Poh has lie *(sic)* about the date of execution of the agreement. (emphasis added)

[22] It is clear that the loss of interest was the surface problem G arising out of the substance of the conduct, or rather misconduct, which was referred to as a conduct in carrying out its stakeholder's duty. The conduct of the applicant as a solicitor was the problem out of which the loss of interest was the damage caused to the complainant in his simple layman's language. We H must not expect the complaint of a layman to be so carefully couched and crafted as that of the elegance and eloquence of legal craftsmanship when compared to that of the Bar Council's complaint where the specific sections of the LPA had been cited as having been breached by the applicant. See pp. 205 to 206 of encl. 5.

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[23] Even in the notes of proceedings before the Investigating Tribunal dated 22 August 2001 at p. 193 of encl. 5 it was recorded without any objection by the applicant as follows:

> Complainant states his case:
>
> ... I refer to RC pg.43. This is M/s Chong & Poh's letter dated 21-01-97. See paragraph 4. The letter explains that ...
>
> the monies were deposited with us and withdrawn later ...
>
> **My point is that when monies are with a solicitors' firm as Stakeholders they should place the funds in F.D.** (emphasis added)

[24] Substantially and strictly speaking, the complaint is essentially directed at the applicant's breach of his undertaking and duty as a stakeholder.

[25] The Bar Council's complaint dated 13 February 2003 at pp. 205 to 206 of encl. 5 is clear. It is not a deviation from the initial complaint of the complainant Mr Siew, but rather it is substantially the same complaint but with specific reference to the particular misconduct complained of by reference to s. 94(3)(k) and (o) of the LPA. A layman is not expected to know the specific misconduct complained of as falling into a proper and particular pigeon hole. Otherwise he would have to engage the services of a solicitor to help him draft the complaint, having already suffered a monetary loss for what he perceived to be improper conduct on the part of the solicitor or firm he complained against.

[26] Where there are clear provisions allowing for a complainant to withdraw his complaint and for the Bar Council to intervene and proceed with the complaint, both the provisions in r. 7 and r. 8 respectively of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 must be given effect to. The provisions read as follows:

> 7. Withdrawal of complaints
>
> (1) A complainant may at any time, by letter addressed to the Director, withdraw his complaint.
>
> (2) Upon receipt of a letter of withdrawal under subrule (1), the Director shall forthwith inform the chairman of the Disciplinary Board and the Secretary of the Bar Council in writing of the withdrawal of the complaint enclosing a copy of the letter of withdrawal.

A (3) Subject to rule 8, the Director shall strike out the withdrawn complaint from the Complaints Register.

8. Bar Council or State Bar Committee may proceed with complaint

B (1) **Notwithstanding the withdrawal of a complaint** under rule 7 and without prejudice to its right to make a complaint of its own motion, **the Bar Council** or a State Bar Committee *may, if it considers there is merit in the complaint, intervene and proceed with the complaint as if it was made of its own motion.*

C (2) Where the Bar Council or a State Bar Committee decides to proceed with a complaint under subrule (1):

(a) the Director shall enter that fact in the Complaints Register;

D (b) the requirements of subrule 3 (3) shall be deemed to the satisfied;

(c) subrule 4 (2) shall not apply to require any refund of the processing fee paid. (emphasis added)

E **[27]** The rationale is not difficult to find. Here Siew did go through the Investigating Tribunal hearing and as the sum complained of in terms of interest of RM6,500 had already been paid to him, he decided to withdraw the complaint. We may not expect a layman complainant to be so public-spirited and F interested in incurring more costs and expenses to pursue to conclusion a complaint especially when after the lodging of the complaint, he had been fully compensated for the loss by the lawyer complained against or by his client. However the Malaysian Bar is statutorily charged under s. 42(1)(b) of the LPA:

G (b) to maintain and improve the standards of conduct and learning of the legal profession in Malaysia;

[28] The withdrawal of a complaint does not mean that if there had been any compromise with the high standard expected and H exacted of a member of the Bar, the Bar Council being the executive body of the Malaysian Bar, is to turn a blind eye and consider the chapter closed. It is incumbent and indeed expected of them to pursue further the complaint against the advocate and solicitor concerned so that no member of the public should have I to be troubled by a similar action of any advocate and solicitor in the future. More particularly, the advocate and solicitor concerned shall know assuredly that any breach of his undertaking or of his duty as a stakeholder is a misconduct that attracts punishment.

[29] When a lawyer undertakes to do something, it is as if and as good as done. No members of the public dealing with any erstwhile member of the legal profession need to entertain any doubt that a lawyer will do as he says he would do. When he represents to another solicitor that monies had been deposited with him as a stakeholder, there is no need to doubt that it had been so deposited and will so remain there until the happening of the stakeholding event, to be released to the right party. When that trust is misplaced and not honoured, it erodes the very confidence and trust that the public expects of a lawyer. Little wonder that the Bar Council takes a very serious view of any complaint that a lawyer has breached his undertaking to a client or his duty as a stakeholder. Hence the liberty given to them to intervene in the complaint and to proceed with it even though the initial complainant had withdrawn the complaint.

[30] There is also no merit in the applicant's argument that the initial complaint was against the legal firm of Messrs Chong & Poh and as such when the Bar Council intervened and filed its complaint on 13 February 2003, it must be directed against the legal firm and not the two partners of the legal firm. Section 99(4) and (5) of the LPA is clear. It reads:

> (4) Where a complaint is made against a legal firm, it shall be deemed to be a complaint made:
>
> (a) in the case of a sole proprietorship, against the advocate and solicitor who was at the material time the sole proprietor of the legal firm; or
>
> (b) in the case of a partnership, against all the advocates and solicitors who were at the material time partners of the legal firm, unless the legal firm satisfies the Disciplinary Board of the identity of the advocate and solicitor in the legal firm against whom the complaint has arisen.
>
> (5) Where at any stage of the proceedings the Disciplinary Board is satisfied that a complaint made against a legal firm should be directed against a particular advocate and solicitor, the Disciplinary Board shall forthwith replace the name of the legal firm with the name of the advocate and solicitor concerned.

[31] Consistent with the deeming provision of s. 99(4)(b) LPA, the Bar Council had named both the partners Chong and Poh and when Chong informed the Disciplinary Committee that he was not the lawyer in the firm that had handled the transaction and when Poh, the applicant confirmed this, the Bar Council did not dispute it. The DB had thus dismissed the complaint against Mr Chong. Granted ss. 99(4) and (5) only came into force on 2 October 2006 by an amendment introduced by Act A1269, by the time of the Disciplinary Committee hearing on 6 September 2011, the amendment had already been in place. The amendment made clear what was germane in s. 99(1) of the LPA that reads:

> (1) Any complaint concerning **the conduct of any advocate and solicitor** or of any pupil shall be in writing and shall in the first place be made or referred to the Disciplinary Board which shall deal with such complaint in accordance with such rules as may from time to time be made under this Part. (emphasis added)

[32] Any complaint is rightly directed at the particular advocate and solicitor whose conduct or rather misconduct has caused loss to the complainant. It is only too obvious that a legal firm cannot act in a *vacuo*, it must be through the instrumentality and agency of an advocate and solicitor unless no one owns up to the action or inaction in question.

Whether The Applicant Had Breached His Undertaking And His Stakeholding Duty As An Advocate And Solicitor In The Circumstances Of The Case

[33] The material facts are not in dispute and it is only the interpretation of it that is being challenged by the applicant. Concerning the applicant Poh, the Disciplinary Committee found as a matter of fact that when Siew signed the agreement and Poh gave his firm's letter of 5 November 1996 and cheque of RM300,000 to Fong dan Rakan-Rakan, all at the meeting of the same date, Poh must have intended and should have realised that Siew and his solicitors would rely on the contents of the letter as factually correct, that is, the purchasers had given the bank draft of RM1.2 million to Messrs Chong & Poh to hold the same for the purpose of the agreement. Further both Siew and his solicitors could and would rely on Messrs Chong & Poh to hold the money

as stakeholders for the purpose of the sale and purchase of the shares, in particular, cl. 2.1(b) of the agreement. The said letter from Messrs Chong & Poh to Messrs Fong dan Rakan-Rakan is reproduced below for its full terms and effect:

> Dear Sirs,
>
> Re: Kuari Kinta Sdn Bhd
>
> We refer to the above.
>
> We forward herewith our client's UMBC cheque no. 304376 for the sum of RM30,000.00 being part payment towards the purchase price of the said shares.
>
> *We also confirmed that the sum of RM1,200,000.00 has been handled (sic) to us as stakeholders pursuant to the terms of the sale and purchase agreement.* (emphasis added)

[34] It is fair for the Disciplinary Committee to have held that Siew and his solicitors would have known that the purchasers were serious about purchasing the company as according to the said letter they had already paid the whole of the balance purchase price of RM1.2 million to Messrs Chong & Poh to hold. From the point of view of Siew and his solicitors, Messrs Chong & Poh could be trusted to hold the money as promised in their letter. It is reasonable for the Disciplinary Committee to have concluded that the above would be major factors to induce the vendors to agree to sell their company to the purchasers.

[35] It is not disputed that Siew and his daughter did sign the agreement as can be seen from Fong dan Rakan-Rakan's letter of 19 November 1996 returning the agreement to Messrs Chong & Poh for stamping. As all prudent solicitors would do, Messrs Fong dan Rakan-Rakan, for completeness and acting cautiously, asked for a copy of the fixed deposit receipt of the sum of RM1.2 million which should have been placed in the fixed deposit account already since it had already been given to Poh on 5 November 1996. It would be fair to say that the subsequent execution of the agreement by Siew's daughter was also premised on the pre-supposition that the sum of RM1.2 million had been so represented by Poh as having been placed in his clients' account. Fong dan Rakan-Rakan received no reply to his query and so he sent another letter dated 4 December 1996. It was only on 4 December 1996, about two weeks later, that Poh replied to say that Messrs Chong & Poh no longer had the money with them!

A The said monies had been given back to Law for he needed it for his business dealings. The following findings at para. 1.8 of the Disciplinary Committee at p. 233 of encl. 5 is impeccable:

> The Disciplinary Committee also notes that by C&P returning the money to the purchaser, when C&P dated the agreement as 22.11.1996, the purchaser breached clause 2.1(b) which said the purchaser was to deposit the RM2.1 million with C&P "upon execution of this agreement" since the RM1.2 million was no longer with C&P on the date of the agreement as the purchaser only paid the RM1.2 million a second time to C&P on 26.12.1996. RC page 43.

[36] It cannot be gainsaid that when Poh gave the firm's letter of 5 November 1996 to Messrs Fong dan Rakan-Rakan, he either knew or should have known that the vendors and their solicitors would rely and/or act on the letter. I agree with the Disciplinary Committee's finding that when Poh returned the RM1.2 million after he had given the said letter, he breached his representation and/or undertaking in his letter for he knew or ought to have known that Siew and his solicitors would consider this to be a breach of his representation and/or undertaking in his said letter. If indeed that there was no concluded agreement yet as contended by Poh, then he could at least have written to Siew's solicitors to state his stand and to give notice to Messrs Fong dan Rakan-Rakan that until the documents referred to in the agreement in cl. 2.2A are deposited with them, there is no concluded agreement and hence premature for the sum of RM1.2 million to be so deposited even though the agreement had been signed by then. Poh did not do that because he could not do that. He knew beyond peradventure that by handing over the payment of RM300,000 and depositing the sum of RM1.2 million, the full RM1.5 million being the purchase price had been paid though the sum of RM1.2 million would only be released by Messrs Chong & Poh as stakeholders' solicitors within one month from the removal of caveat from the said land belonging to the company whose shares were the subject matter of the purchase.

[37] Poh did not give notice to Messrs Fong dan Rakan-Rakan for he knew they would object to such a move that would result in the inescapable unilateral variation of the agreement upon Siew's daughter signing the agreement for at that point in time the

RM1.2 million was no longer with Messrs Chong & Poh being the stakeholders' solicitors. Nothing could be more obvious! No amount of rationalising would reverse the stark reality of Poh's action in returning the RM1.2million held by Messrs Chong & Poh. The said solicitor Poh captured this stark reality in his letter to Siew's solicitors dated 21 January 1997 at p. 43 of encl. 5:

> The letter dated 5.11.96 was sent to you as at that time the monies **were deposited with us and withdrawn later.** Our client only executed the Sale and Purchase Agreement on the 22.11.96. **By that time the monies were no longer with us.** (emphasis added)

[38] It is not true that when Poh's client Law had asked for the RM1.2million to be returned to him, he had vacillated between the devil and the deep blue sea, to use Poh's own description of his predicament. Granted Law was a long-standing client of Poh and perhaps the fear of losing a client and much legal work was operating in the forefront of Poh's mind. We do well to remind themselves that clients would come and go but a good name built through the years may be compromised by an act of indiscretion when in a moment of weakness we succumb to pressure from our client.

[39] There were a few options opened to Poh when confronted with such a pressure. He could have written to Siew's solicitors to convey his client's stand on the matter and give notice that unless the agreement was returned duly executed by Siew's daughter together with the confirmation that the relevant documents had been so deposited with them, he would proceed to return the RM1.2 million. Had Poh summoned the courage to do that he would probably be met with the response that he would be in breach of his stakeholder's duty if he were to do that. The fact of the matter was that he did not want to rock the boat so to speak because his clients were interested in the purchase and wanted to seal it as soon as possible.

[40] When a solicitor is pulled asunder with his client wanting him to release the stakeholders monies and the other side threatening to complain to the DB for breach of a solicitor's undertaking or stakeholder's duty or to sue him, he can take out

A an interpleader's summons for the court to determine what he should do in the circumstance. Order 17 r. 1 of the Rules of the High Court 1980 ('RHC') as then applicable reads as follows:

> 1 Entitlement to relief by way of interpleader (O. 17 r. 1)
>
> B (1) Where:
>
> (a) a person is under a liability in respect of a debt or in respect of any money, goods or chattels and he is, or expects to be, sued for or in respect of that debt or money or those goods or chattels by two or more persons making adverse claims thereto, or
>
> C
>
> (b) claim is made to any money, goods or chattels taken or intended to be taken by a sheriff in execution under any process, or to the proceeds or value of any such goods or chattels, by a person other than the person against whom the process is issued, the person under liability as mentioned in sub-paragraph (a), or (subject to rule 2) the sheriff, may apply to the Court for relief by way of interpleader.
>
> D

[41] As was explained by His Lordship Abdul Malik Ishak JCA E in the Court of Appeal in *Tan Kau Tiah v. Tetuan Teh Kim Teh, Salina & Co & Anor* [2010] 4 CLJ 914 at p. 928; [2010] 3 MLJ 569 at p. 581:

> [22] Order 17 of the RHC confers a wide power on the court to grant relief by way of interpleader proceedings. Likewise item 5 F of the Schedule to the Courts of Judicature Act 1964 (Act 91) gives the High Court additional powers to grant an interpleader relief. Interpleader proceedings are proceedings to assist the applicant to extricate himself from the embarrassment of being sued, or likely to be sued by more than one party in respect of G the same subject matter and, at the same time, it would enable the claimants to be put in a situation where they can insist upon their claims.

[42] Without calling in aid the assistance of the court by way of H an interpleader's summons hearing, a solicitor takes the risk of being sued or of a complaint being lodged against him for what appears to be a breach of solicitor's undertaking and breach of the terms of stakeholding.

[43] Whilst it is true that the word "undertaking" does not I appear in the letter of 5 November 1996 (p. 38 of encl. 5), the brief letter taken as a whole in the context of cl. 2.1(b) of the

agreement cannot be understood otherwise than as an undertaking given by Poh and which the complainant Siew had placed complete reliance on as being assured that the sum of RM1.2 million had been so deposited with Poh's firm and will be paid out when the stakeholding event materialises together with accrued interest. Again in *Tan Kau Tiah v. Tetuan Teh Kim Teh, Salina & Co & Anor* [2010] 4 CLJ 914 at pp. 940-941; [2010] 3 MLJ 569 at p. 591 it was observed as follows:

> [64] An undertaking requires no formality. It need not be in writing and the word 'undertaking' need not be used. If the undertaking is in writing, like the present appeal at hand, it would be sufficient if the words used can be clearly construed as a promise given by a solicitor and that it is intended to be relied upon. In *John Fox (a firm) v. Bannister King & Rigbeys (a firm)*, the following words used by the solicitor were construed as an undertaking (see p 739 of the report):
>
> > ... no doubt you and Geoff (the client) will sort out as to the £18,000.00 which is still in my account and which of course I shall retain until you have sorted everything out.
>
> [65] According to the case of *Goldman v. Abbott* (1989) 139 Sol Jo 828, an undertaking can be construed from several documents read together.

[44] The duty of a solicitor who acts as a stakeholder has been clearly captured in the Supreme Court in the case of *Toh Theam Hock v. Kemajuan Perwira Management Corp Sdn Bhd* [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 at p. 402; [1988] 1 MLJ 116 at p. 118 as follows:

> In sale and purchase agreement cases the position is put clearly by Lord Edmund-Davies in *Sorrell v. Finch* [1977] AC 728 who repeated what was said in *Mahoney v. Hardy* (1970) 216 EG 1582:
>
> > The essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; *meanwhile the third party holding the deposit may part with it to neither contracting party without the consent of the other* ... (emphasis added)

[45] Further at p. 402 (CLJ); p. 118 (MLJ):

> In *Burt v. Claude Cousins & Co Ltd* [1971] 2 QB 426 Lord Denning MR in his dissenting judgment explained the liability of an estate agent or solicitor receiving a deposit as a stakeholder which statement of the law was accepted by the House of Lords in *Sorrell v. Finch* [1977] A.C. 728. He said:
>
> > If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit "as stakeholder," he is under a duty to hold it *in medio* pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds as trustee for both to await the event ...

[46] The learned author Jeffrey Pinsler in *Ethics And Professional Responsibility - A Code for the Advocate And Solicitor*, Academy Publishing, 2007, Singapore, captured the solemnity and seriousness of a stakeholder's duty in the following words at para. 25-029 at pp. 388-389:

> It is also common for the advocate and solicitor to be a stakeholder, in which case he assumes professional responsibilities to the parties involved in the transaction. If, as in the usual case, he undertakes not to release the funds deposited with him until the happening of an event, he must not release them for any other reason. He must honour the terms of the undertaking. This duty to the other parties to the transaction overrides his duty to his own client ... (emphasis added)

[47] The learned author then quoted from the *dicta* of Tay Yong Kwang J in *Law Society of Singapore v. Tham Kok Leong Thomas* [2006] 1 SLR 775 as follows:

> 28 *A stakeholder, by agreeing to assume that role, undertakes to the parties involved in the transaction giving rise to the need for the stakeholding function that he will perform his role impartially and will hold the money in issue until the occurrence of the specified eventuality. Where the stakeholder is performing that function as a solicitor, the undertaking is not merely a contractual obligation which can be enforced by a civil action. It is elevated to an undertaking given by someone from an honourable profession, the breach of which also attracts disciplinary action.* As Hamilton J in *United Mining and Finance Corporation, Limited v. Becher* [1910] 2 KB 296 at 307, in explaining the expression "in his capacity as a solicitor", said:
>
> > Whatever that expression may mean, I think it must at least go as far as this, that when a solicitor, in the course of business which he is conducting for clients with third

> parties in the way of his profession, gives an undertaking to those third parties incidental to those negotiations, that undertaking is one which is given in his capacity as a solicitor and not as a mere layman undertaking the office of stakeholder or guaranteeing the payment of money. It seems to me that the part which solicitors are nowadays well known to play in elaborate negotiations, which constantly have to be embodied at various stages in legal forms of a highly technical character, constantly involves for the purpose of facilitating the business the giving of subsidiary undertakings for the payment of money and of a similar character, and that those undertakings are given in their capacity as solicitors, and money is entrusted to them under those undertakings largely because they are solicitors and are deemed therefore, and found to be, especially worthy of trust. (emphasis added)

[48] See also the case of *Kuldip Singh & Anor v. Lembaga Letrik Negara & Anor* [1982] 1 LNS 73; [1983] 1 MLJ 256 and *How v. Tricorp Properties Sdn Bhd; Majlis Peguam Malaysia (Intervener)* [2011] 4 CLJ 909.

Pronouncement

[49] In the light of the findings of facts by the Disciplinary Committee I find no reason to disturb it based on the numerous case law elucidation and exposition on this area of breach of a solicitor's undertaking as well as a breach of a solicitor's stakeholding duty that in releasing the sum of RM1.2 million to the purchaser Law without complying with cl. 2.1(b) of the Agreement, the applicant Poh had committed a misconduct within the scope of s. 94(3)(o) of the LPA. It reads:

> "Misconduct" means conduct or omission to act in Malaysia or elsewhere by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes ... being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

[50] Taking into consideration that the loss of the complainant Siew had been compensated for and that the solicitor Poh had not benefited personally from the transaction the DB had by its order dated 9 December 2011 at p. 284 of encl. 5 imposed a penalty of RM5,000 payable to the discipline fund within a month from the date of the order. This court should not disturb the penalty imposed. The Federal Court decision of *Keith Sellar v. Lee*

Kwang and Tennakoon V Lee Kwang [1980] 1 LNS 36; [1980] 2 MLJ 191; the Court of Appeal decision of *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878; [1998] 3 MLJ 341; and the English Court of Appeal decision of *Bolton v. Law Society* [1994] 2 All ER 486, are all in agreement that it is a well entrenched principle of law that a court should only interfere the exercise of discretion of the DB in rare and exceptional circumstances.

[51] I would adopt the *dicta* of His Lordship Gopal Sri Ram JCA (as he then was) in *Gana Muthusamy v. Tetuan LM Ong & Co* [1998] 4 CLJ 878 at p. 881; [1998] 3 MLJ 341 at pp. 344-345:

> It is primarily for members of the Bar to decide what amounts to conduct unbecoming of an advocate and solicitor in particular circumstances, according to standards established by members of that honourable profession. Courts must necessarily exercise caution when entertaining an appeal in which the central question is whether particular conduct is unprofessional and cases meriting curial interference will be rare. Otherwise it will be the court and not the profession that will determine the yardstick of professional behaviour. We would, in this context, express our agreement with the following passage in the *Guide to the Professional Conduct of Solicitors* issued by the Council of the Law Society in 1974, quoted by the learned judges of the High Court in their judgment:
>
> > One of the hallmarks of a developed profession is that it should lay down and maintain standards of professional conduct for its members based upon the best thinking of those members as to what constitutes proper conduct for a member of that profession.
>
> In our judgment, court will be entitled to interfere only if what has been found by a Disciplinary Committee to be unprofessional conduct will not be considered to be such by the best thinking members of the profession. The present case does not come within the reach of that test and accordingly this appeal fails.

[52] I see no good reason to disturb the finding of misconduct as well as the penalty imposed in the circumstances of the case.

[53] The application/appeal was thus dismissed. By consent of the parties there was no order made as to costs.

Postscript

[54] It is a tough and demanding calling for all those in the legal profession. It requires fortitude of spirit, firmness of stand and forthrightness of speech. Everyday they fight many a battle in their quest for that which is right, fair and reasonable. Sometimes the battle comes from a most unlikely source, their very own client. Theirs is not a business where the maxim "Customer is King" rules. Theirs is a profession where the demands of a client must be subordinated to the demands of fairness, justice, truth, honour and integrity. Saying 'no' to a client might be the hardest thing to do. When the testing comes, it is hoped that every lawyer will be able to summon the courage to say and do just the right thing.